

Joint Admin. Procedure Oversight Committee: Subcommittee on Dental Board Case NC General Assembly

Analysis and Recommendations from
Judith Welch Wegner, Professor of Law, UNC School of Law
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Occupational Licensing & Regulation Generally

► Challenges

- Typically seek expertise from those in the professional universe/those being licensed who are trained in the special field to regulate each other
- Want that expertise so that it is possible to protect “consumers”/lay people who need to hire those with expertise to address their needs and need to trust them since laypeople lack basis for assessing
- BUT... there is a risk that those with expertise will come together to exclude other providers in order to protect “the guild”... and drive up prices
- AND ... special complications with “scope of practice” (regarding overlapping areas of expertise between/among related fields)
- Also: increasing desire in some quarters to “de-regulate” so those with abilities need not pay such high prices to enter into the field
- Traditional legal challenges based on “substantive due process”; now “antitrust” may be the thing

NC Dental Board: Legal Framework (Board)

- ▶ NC legislature has done a good job in many respects
 - NC Gen. Stat. §§ 90–22 – 90–48.3 (Article 2. Dentistry)
 - 90–22(a) Practice of dentistry declared to affect public health, safety, welfare; subject to **regulation and control in public interest**; act to be liberally construed
 - 90–22(b) Dental Board created and is **agency of the state**

NC Dental Board: Duties and Powers

- 90–29(b)(2) Practice of dentistry includes:
 - “Removing stains, accretions or deposits from the human teeth”
- 90–30 Dental Board may license applicants to practice
- 90–40 Unlicensed practice is class 1 misdemeanor
- 90–41 Practice of dentistry by any person not duly licensed
declared inimical to health, safety, welfare... may be enjoined by
Attorney General, district attorney, Board of Dental Examiners, or
resident
- 90–43 Board authorized to enact rules and regulations not
inconsistent with statute (but subject to procedures in NC Gen. Stat.
150B)

Federal Antitrust Requirements

- **Relevant Federal Statutes**
 - **Federal Trade Commission Act:** prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.” (1914)
 - **Sherman Act:** prohibits “every [unreasonable] contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.” [FTC can enforce] (1890)
 - **Clayton Act** (not at issue here): prohibits price discrimination, tying arrangements, mergers & acquisitions that would substantially lessen competition (1914, & amended)
 - **Substantial penalties**

Antitrust Exception: *Parker v. Brown*

- **Case** involved California raisin production “proration” scheme designed to provide income stability to farmers; system was overseen by state board
- **Supreme Court carved out exception** from federal antitrust laws “to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity” (*exception is not in statutory text or legislative history*)
- Interpretation and application of *Parker* is more complex than might appear

Closest Analogue...

California Retail Liquor Dealers Ass'n v. Midcal (1980)


- **States & private actors**
 - California statute required wine producers and wholesalers to file fair trade contracts or price schedules with state. If failed to do so, wholesalers prohibited from selling at less than prices set by fair trade contracts or price schedules.
 - Court held that to qualify under *Parker* doctrine, **two-prong test** must be met:
 - Anticompetitive policy must be **clearly articulated & affirmatively expressed** by state **AND**
 - Actions of group authorized to implement state policy must be “**actively supervised by the state**”
 - On stated facts, state authorized price-setting by private parties (in effect creating a private price-fixing arrangement); state did not establish prices, review reasonableness of price schedules, regulate terms of fair trade contracts, monitor market conditions or engage in any “pointed reexamination” of the program

NC Dental Board: Supreme Court Ruling

► Majority

- Dental Board is “nonsovereign actor” whose conduct does not automatically qualify as that of sovereign state itself
 - Immunity for state agencies requires more than “mere façade of state involvement”
 - Particularly so when State seeks to delegate regulatory power to “active market participants”; too much risk of blending anticompetitive motives with decisions
- Midcal governs
 - Requirement of **active supervision** designed to avoid risk and harm when private parties are engaging in anticompetitive activity
 - Rejects claim of dissenters that mere status as “state agency” is enough

NC Dental Board: Problems (in hindsight)

- ▶ Board largely controlled by dentists elected by “market participants” (public members and hygienists at the margin)
 - ▶ Acted based on complaints of dentists about competing teeth whiteners in shopping malls
 - ▶ Did not have explicit authority to issue “cease and desist” orders on its own motion without going through DA and courts
 - ▶ Did not engage in rule-making regarding teeth whitening (with input from consumers and others) and legislatively-approved rule-making though could have done
 - ▶ Did not employ judicial processes (through AG or DAs) as means of allowing independent judgment on potential claims of unauthorized practice
 - ▶ Relied upon counsel independently employed by licensing board with licensing revenues rather than state actor with wider vantage and accountability
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Observations Moving Forward

- ▶ Key is active state supervision of occupational licensing board where composed of substantial number of market participants
 - In what contexts is active supervision important? (anticompetitive decisions such as unlicensed practice)
 - In what contexts is active supervision already available (appeals of individual licensure denials and taking away licenses)
- ▶ What does active state supervision entail, where needed?
 - FTC guidance: not just procedural, but substantive decision-making by supervisor (review substance of decision; power to veto or change; supervisor may not be part of the active market)

Advice Moving Forward

- ▶ **Require occupational licensing boards to engage in rule making per state law when they are defining unlicensed practice**
 - Important because this area is edge of potential anticompetitive behavior
 - Helpful because there are already methods for reviewing decisions of this sort
- ▶ **Require occupational licensing boards to route “unlicensed practice” complaints through the AG’s office**
 - This approach provides general oversight and assures supervision by disinterested parties
- ▶ **Consider special issues of separation of powers**
 - NC State Bar has agreed to give Legal Zoom a way forward; should the nature of “unlicensed practice” of law be defined through rule-making through the NC Supreme Court?

Questions and Comments?

Judith Welch Wegner
Burton Craige Professor and Dean Emerita
UNC School of Law
CB 3380
Chapel Hill, NC 27599-3380
E-Mail: judith_Wegner@unc.edu
Phone: 919-962-4113
FAX: 919-962-1277

